IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1262 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JAGDISHBHAI RATNABHAI BHARVAD BROTHER OF GOGALBHAI R BHARVAD

Versus

STATE OF GUJARAT

Appearance:

MR PARTHIV B SHAH for Petitioner

MR HL JANI AGP for Respondent Nos.1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 14/08/2001

ORAL JUDGEMENT

1. Mr.P. B. Shah, learned advocate for the petitioner and Mr.H. L. Jani, learned AGP for the respondents.

2. In the present petition, under Article 226 of the Constitution of India, the order of detention dated

10/1/2001 passed by the Police Commissioner, Ahmedabad City has been challenged by the petitioner. The order of the detention has been passed by the Commissioner of Police, Ahmedabad City under Section 9(1) of the Prevention of Anti Social Activities Act, 1985 (hereinafter be referred to as "the PASA Act"). The present petitioner has been detained as a Class-II detenu in Special Jail, Porbandar. The ground of detention, two offences were registered against the present petitioner on 27/1/1999 and 1/6/2000 and the three unregistered offences were registered on 11/11/2000, 22/11/2000 and 16/12/2000, on the basis of the statements of the secret witnesses. The petitioner has been considered as a dangerous person under Section 2(c) of the PASA Act. The petitioner was enlarged on bail in respect to the registered offences. The statement of the secret witnesses were recorded on 5/1/2001 and 6/1/2001 and verified the same on 9/1/2001. Thereafter, immediately on the very next day i.e. on 10/1/2001, the order of detention has been passed by the detaining authority. The specific contention has been raised by the petitioner in Ground-(k) at page-(9) and Ground-(l) at page-(10) of the petition. The respondents have filed affidavit-in-reply.

3. Mr.P. B. Shah, learned advocate for the petitioner has challenged the order of detention on various ground, but according to him, two contentions are enough to vitiate the order of detention. The first contention, which has been raised by Mr.Shah that looking to the statement of the secret witnesses, which have been verified by the detaining authority on 10/1/2001 and immediately on the very next day the order of detention has been passed. Therefore, the detaining authority has exercise his power in mechanical manner as well as in arbitrary manner and it amounts to non-application of mind. Mr.Shah has submitted that it is a duty of the detaining authority to verify and examine the genuineness of the statements made by the secret witnesses but instead of that only verifying the person and not examining the factual aspects, which have been narrated by the secret witnesses before the detaining authority and, therefore, the privilege claimed under Section 9(2) of the PASA Act not to disclose the names, addresses and occupation of the secret witnesses adversely affected the legal right of having effective representation under Article 22(5) of the Constitution of India. Mr.Shah has relied upon the decision of this Court in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat & Others, reported in 2000 (3) GLR 2696. The second contention has been raised by Mr.Shah that looking

to the three offences were unregistered against the present petitioner on 11/11/2000, 22/11/2000 and 16/12/2000, the order of detention has been passed on 10/1/2001, therefore, there was a delay in passing the order of detention. The specific contention has been raised by the petitioner in paras-(6) and (9) of the petition and, therefore, according to Mr.Shah, if there is a delay in passing the order of detention is vitiated. Mr.Shah has relied upon the decision of this Court in the case of Elesh Nandubhai Patel v/s. Commissioner of Police, Ahmedabad City & others, reported in 1997 (1) GLH 381. Therefore, the order of detention is required to be quashed and set aside.

4. Mr.H. L. Jani, learned AGP for the respondents has submitted that looking to the facts and circumstances and materials on record were justified by the order of detention. Mr.Jani has also submitted that there were compelling circumstances with the detaining authority to pass the detention order, otherwise, the petitioner will indulge the same activities, which disturbed the public order. Mr.Jani has also submitted that the contention which has been raised by the petitioner, which has been answered in detail by the detaining authority. Mr.Jani has relied upon para-(6) and (9) of the reply. Mr.Jani has also submitted that looking to the unregistered offences dated 11/11/2000, 22/11/2000 and 16/12/2000, there was no delay in passing the order of detention. Mr.Jani has also submitted that the detaining authority has examined the genuineness of the statement of the secret witnesses and after verifying the same, the order of detention has been passed. Therefore, the order of detention is legal and valid and the same does not required any interference by this Court.

5. I have considered the submissions of both the learned advocates. The contention in respect to claim the privilege under Section 9(2) of the PASA Act by the detaining authority not to disclose the names, addresses and occupation of the secret witnesses are definitely having occurred on the legal right of the petitioner has made an effective representation under Article 22(5) of the Constitution of India. Therefore, it is a duty of the detaining authority to examine the genuineness of statements made by the secret witnesses and factual aspects which have been narrated by the secret witnesses and they should have to get sufficient time. But looking to the facts which are on record, after recording the statements of the secret witnesses and verifying the same, immediately on the next day, the order of detention

has been passed. Therefore, the exercise which required undertaken by the detaining authority has not been taken care to verify the genuineness of the factual aspect narrated by the secret witnesses. Therefore, the view taken by the Full Bench of this Court in the case of Chandrakant N. Patel v. State of Gujarat 7 Ors., reported in 1994 (1) GLR 761, wherein before claiming the privilege under Section 9(2) of the PASA Act. It is a duty of the detaining authority to consider the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu. But in the present case, looking to the affidavit-in-reply filed by the detaining authority, this aspect has not been taken into account before claiming the privilege under Section 9(2) of the PASA Act. Therefore, after verifying the statement of the secret witnesses immediately on the very next day, the detaining authority has exercise the powers in mechanical manner and in arbitrary manner which amounts to non-application of mind on the part of the detaining authority. The view taken by the Division Bench of this Court in the case of Kalidas Chandubhai Kahar v. State of Gujarat & Ors., reported in 1993 (2) G.L.R. 1659 has been considered by this Court. Recently, this Court has also examined this very issue in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat & Ors., reported in 2000 (3) G.L.R. 2696 and the following observations are also important, which are quoted as under :-

" After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July 1999, 13th June 1999 and 26th June 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August 1999 at any time prior to 29th August 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had

been made on the respective dates were correct and immediately thereafter, on the following day i.e. on 30th August 1999 the detention order has been passed.

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Section 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division bench that it is a case of wrong exercise of power under Section 9(2) and it is established that in such cases, the wrong exercise of power under Section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under ARt.22(5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the

detention order has been passed on 30th August 1999 i.e., on the next day to the date on which the materials were considered by the detaining authority."

6. In respect to the second contention that there is a delay from the date of last offence dated 15/10/2000 for passing the order of detention, there was no such explanation given by the detaining authority as to why there was a delay in passing the order of detention. Looking to the facts on record, there was no immidiat genuineness and proximately to pass the order of detention and, therefore, the view taken by this Court in the case of Elesh Nandubhai Patel v/s. Commissioner of Police, Ahmedabad City & others, reported in 1997 (1) GLH 381, the relevant para-(21) of the aforesaid decision is quoted as under :-

"21. In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent Court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 05, 1996, i.e. after a delay of 5 months and 15 days. It is of course true that the detaining authority has relied on two incidents of 2nd October and 10th October 1996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U.P. reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S.Ramamurthy reported in 1993 (2) Suppli. SCC 61."

7. In view of the aforesaid observation made by this Court and looking to the facts which are on record, the detaining authority has exercised the power in mechanical manner as well as in arbitrary manner, while claiming the privilege under Section 9(2) of the PASA Act and not to

pass the detention order immediately. But there was a delay in passing the detention order about more than 2 months from the date of last registered offence dated 15/10/2000 which remains unexplained and, therefore, according to my opinion the order of detention is required to be quashed and set aside.

8. For the aforesaid reasons, the petition succeeds and the same is allowed. The order of detention dated 10/1/2001 is vitiated and resulted to quash and set aside. The detenu Gogalbhai alias Rajubhai Ratnabhai Bharwad who has been detained at Special Jail, Porbandar be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

[H. K. RATHOD,J.]

(vrpanchal)